

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	WT Docket No. 02-87
Amendment of Section 1.937 of the Commission's	)	
Rules Concerning Repetitious or Conflicting	)	
Applications	)	

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: March 14, 2002**

**Released: March 20, 2002**

**Comment Date:** [30 days after Federal Register Publication]

**Reply Comment Date:** [45 days after Federal Register Publication]

By the Commission:

**I. INTRODUCTION AND EXECUTIVE SUMMARY**

1. In this *Notice of Proposed Rule Making (Notice)*, we propose to amend Section 1.937 of our Rules<sup>1</sup> to prohibit the filing of any repetitious license application in the Wireless Radio Services within twelve months of the denial or dismissal with prejudice of a substantially similar application. We also propose to streamline our Rules barring repetitious applications by combining Sections 1.937(a)<sup>2</sup> and (b)<sup>3</sup> into one simplified rule. Our goal is to simplify and clarify our rules against repetitious applications. This will promote the most efficient use of the Commission's resources by preventing the filing of such applications and barring applicants from immediately re-litigating decided matters.

**II. BACKGROUND**

2. The Commission's Rules have long prevented the filing of repetitious license applications. Prior to 1998, the rules barring repetitious license applications were set forth in separate rule parts pertaining to each wireless service.<sup>4</sup> These rules generally prohibited the filing of a repetitious application within twelve months of the denial or dismissal with prejudice of a substantially similar application.<sup>5</sup> In 1998, the Commission consolidated its licensing rules for all wireless radio services,<sup>6</sup> and

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<sup>1</sup> 47 C.F.R. § 1.937.

<sup>2</sup> 47 C.F.R. § 1.937(a).

<sup>3</sup> 47 C.F.R. § 1.937(b).

<sup>4</sup> See, e.g., 47 C.F.R. § 1.916 (1998) (barring repetitious applications in the private radio services); 47 C.F.R. § 22.121 (1998) (barring repetitious, inconsistent or conflicting applications in the public mobile services); 47 C.F.R. § 24.421 (1998) (barring inconsistent or conflicting applications in the personal communications services); 47 C.F.R. § 26.312 (1998) (barring inconsistent or conflicting applications in the general wireless communications services); 47 C.F.R. § 101.27 (1998) (barring repetitious applications in the fixed microwave services).

<sup>5</sup> See, e.g., 47 C.F.R. §§ 1.916, 101.27 (1998).

enacted Section 1.937 to replace its prior rules on the filing of repetitious or conflicting applications.<sup>7</sup> Section 1.937 provides,

(a) Where the Commission has, for any reason, dismissed an application for a new station or for any modification of services or facilities with prejudice, or revoked the license for a radio station in the Wireless Radio Services, the Commission will not consider a like or new application involving service of the same kind to substantially the same area by substantially the same applicant, its successor or assignee, or on behalf of or for the benefit of the original parties in interest, until after the lapse of 12 months from the effective date of final Commission action.

(b) If an applicant has been afforded an opportunity for a hearing with respect to an application for a new station or an enlargement of service area, and the Commission has, after hearing or default, denied the application or dismissed it with prejudice, the Commission will not consider a like application for service of the same type to the same area by that applicant, or by its successor or assignee, or on behalf of or for the benefit of the parties in interest to the original application, until after the lapse of 12 months from the effective date of final Commission action on the original application.

(c) If an appeal has been taken from the action of the Commission denying a particular application, a like application for service of the same type to the same area, in whole or in part, filed by that applicant or by its successor or assignee, or on behalf of or for the benefit of the parties in interest to the original application, will not be considered until the final disposition of such appeal.

(d) While an application is pending, any subsequent inconsistent or conflicting application submitted by, on behalf of, or for the benefit of the same applicant, its successor or assignee will not be accepted for filing.<sup>8</sup>

Section 1.937 and its antecedents were adopted to achieve sound administrative process by barring applicants from immediately re-litigating matters already decided.<sup>9</sup>

### III. DISCUSSION

3. As currently written, Sections 1.937(a) and (b) detail specific applications that may not be repeated within twelve months of the denial or dismissal with prejudice of a substantially similar application. Specifically, applicants may not repeat applications for new stations, or for modification of services or facilities, or for licenses that have been revoked. Because they bar specific types of applications, these provisions can be interpreted as permitting the filing of other repetitious applications that are not specified in the rule. For example, although the Commission generally does not distinguish between applications for new service and applications for renewal,<sup>10</sup> Section 1.937 does not specifically

(Continued from previous page) \_\_\_\_\_

<sup>6</sup> See In the Matter of Biennial Regulatory Review - Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, WT Docket No. 98-20, 13 FCC Rcd 21027 (1998).

<sup>7</sup> See 47 C.F.R. § 1.937.

<sup>8</sup> *Id.*

<sup>9</sup> See In Re Applications of Salter Broadcasting, *Memorandum Opinion and Order*, 6 FCC 2d 809, 814 ¶ 10 (1967) (*Salter MO&O*).

<sup>10</sup> *Id.*

bar repetitious renewal applications. As a result, in at least one instance, a licensee has filed a repetitious application for the same service less than twelve months after the denial of his renewal application.<sup>11</sup> Such cases can consume significant resources to re-litigate identical issues involving the same applicants very close in time.

4. In drafting Section 1.937, the Commission did not intend to permit repetitious renewal applications, or any other type of repetitious application. In fact, the Commission has previously held that dismissal of a renewal application is tantamount to denial or dismissal of a new application, thereby triggering the bar against repetitious applications.<sup>12</sup> The Commission reasoned that the rule's goal--the attainment of sound administrative process by preventing the relitigation of decided matters--would be easily circumvented if applicants were free to refile for the same relief immediately after being denied such relief.<sup>13</sup> Further, the Commission opined "that the same salutary principal--conducive to orderly administrative procedure--should apply equally in the case where an application for a renewal of license has been denied after a full hearing."<sup>14</sup>

5. We see no reason to treat applications repeating renewal applications differently from and more favorably than applications repeating applications for new service. Indeed, we believe that all applications in the Wireless Radio Services should be subject to the same limitations. Relitigating recently decided matters does not constitute an efficient use of Commission resources, and diverts attention from important matters needing resolution. Therefore, we hereby propose to amend Section 1.937 to prohibit any repetitious application in the Wireless Radio Services within twelve months of the denial or dismissal with prejudice of a substantially similar application.<sup>15</sup> The language of the new subsection (a)<sup>16</sup> will be amended to reflect its applicability to all types of license applications, and applies equally to all actions including dismissals with prejudice, denials and revocations. Likewise, subsection (c) will be amended to include dismissed applications. We seek comment on this proposed amendment of Section 1.937. Conversely, we also seek comment on whether there is any sound basis to differentiate amongst any type of application in the wireless radio services, including renewal applications, applications for new licenses, modification applications, assignment applications, and applications for facilities the license for which was revoked. We further ask commenters to discuss whether there are any instances where repetitious applications should be permitted, and if so, whether doing so would be consistent with our goal of promoting the most efficient use of the Commission's resource. Finally, we ask commenters to address whether there is any reason to differentiate amongst denied applications, dismissed applications, or cases where a license is revoked.

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<sup>11</sup> See, e.g., In the Matter of Application of Herbert L. Schoenbohm for a Station License in the Amateur Radio Service and Application of Herbert L. Schoenbohm for a General Class Operator License in the Amateur Radio Service, WT Docket No. 01-352, *Hearing Designation Order*, FCC 01-392 (rel. Jan. 9, 2002).

<sup>12</sup> *Salter MO&O*, 6 FCC 2d at 814 ¶ 10.

<sup>13</sup> *Id.*

<sup>14</sup> In Re Applications of Lorain Community Broadcasting Co., Lorain, Ohio, *Memorandum Opinion and Order*, 5 FCC 2d 55, 57 ¶ 6 (1966).

<sup>15</sup> We do not propose to expand the language of Section 1.937 to prohibit applications repeating renewal applications that were dismissed without prejudice, as this would bar a licensee whose renewal application was dismissed as late-filed, see 47 C.F.R. § 1.949(a), from seeking a new license to replace the expired license.

<sup>16</sup> See ¶ 6, *infra*.

6. We also believe that Sections 1.937(a) and (b) can be streamlined into a single, simplified rule. Both sections generally prohibit repetitious applications. Both forbid repetitious applications upon the dismissal, with prejudice, of a substantially similar application. Furthermore, although hearings are only mentioned in Section 1.937(b), both sections are applicable to denials after the applicant has been afforded an opportunity for a hearing, because Section 1.937(a) covers license revocations, which are only possible after a hearing. Thus, we tentatively conclude that Sections (a) and (b) are sufficiently similar to combine into a single rule. We seek comment on this conclusion. We ask commenters to address whether any regulatory goals would be achieved by retaining the two separate sections. Commenters are also asked to review the proposed rule, set forth in Appendix A, and indicate whether the revised rule achieves the goals discussed herein.

## **V. PROCEDURAL MATTERS**

### **A. Ex Parte Rules - Permit-But-Disclose Proceeding**

7. This is a permit-but-disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in our Rules.<sup>17</sup>

### **B. Regulatory Flexibility Act**

8. The Regulatory Flexibility Act (RFA)<sup>18</sup> requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."<sup>19</sup> The purpose of this *Notice* is to prohibit the filing of applications for radio station licenses within twelve months of the denial of a substantially similar application. This change is proposed to promote the most efficient use of the Commission's resources by preventing the immediate filing of repetitious applications. The proposed rule change does not impose any additional compliance burden on small entities regulated by the Commission. Accordingly, we certify, pursuant to Section 605(b) of the RFA, that the rule proposed in this *Notice* will not have a significant economic impact upon a substantial number of small entities, as that term is defined by the RFA. The Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this *Notice*, including this certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the RFA. We shall also publish a copy of this certification in the Federal Register. With respect to the proposed rules, we shall analyze the information submitted during the comment period and, if we determine at the time we issue a final rule that such final rule changes will have a significant economic impact on a significant number of small entities, we shall prepare a Final Regulatory Flexibility Analysis.

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<sup>17</sup>See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

<sup>18</sup>5 U.S.C. § 603.

<sup>19</sup>5 U.S.C. § 605(b).

### C. Paperwork Reduction Act

This *Notice* does not contain either a proposed or modified information collection.

### D. Comment Dates

9. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before [30 days after Federal Register publication] and reply comments on or before [45 days after Federal Register publication].<sup>20</sup> Comments may be filed using the Commission's Electronic Filing System (ECFS) or by filing paper copies.<sup>21</sup>

10. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, then commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

11. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Acting Secretary, William F. Caton, Office of the Secretary, Federal Communications Commission, 445 12th St., S.W., Washington, D.C. 20554. Filings can be sent first class by the US Postal Service, by an overnight courier or hand and messenger-delivered. Hand and message-delivered paper filings must be delivered to 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. Overnight courier (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

12. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Genevieve Augustin, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, 445 12th St., S.W., Room 3-A431, Washington, D.C. 20554. Such a submission should be on a 3.5-inch diskette formatted in an IBM compatible format using Microsoft Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the lead docket number in this case, WT Docket No. 02-87), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters should send diskette copies to the Commission's copy contractor, Qualex International, Inc., 445 12th St., S.W., Room CY-B402, Washington, D.C. 20554.

### E. Ordering Clauses

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<sup>20</sup> 47 C.F.R. §§ 1.415, 1.419

<sup>21</sup> See Electronic Filing of Documents in Rulemaking Proceedings, *Report and Order*, GC Docket No. 97-113, 13 FCC Red 11322 (1998).

13. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, this *Notice of Proposed Rule Making* IS HEREBY ADOPTED, and NOTICE IS HEREBY GIVEN of the proposed regulatory changes described in the *Notice of Proposed of Rule Making* and contained in Appendix A.

14. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Notice of Proposed Rule Making*, including the Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

#### **F. Further Information**

15. For further information, contact Genevieve Augustin, Esq., [gaugusti@fcc.gov](mailto:gaugusti@fcc.gov), Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, (202) 418-0680, or TTY (202) 418-7233.

16. Alternative formats (computer diskette, large print, audiocassette and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-0260, TTY (202) 418-2555, or at [bmillin@fcc.gov](mailto:bmillin@fcc.gov). This *Notice of Proposed Rule Making* can also be downloaded at: <http://www.fcc.gov/dtf/>.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

**APPENDIX A  
PROPOSED RULE**

Chapter I of Title 47 of the Code of Federal Regulations, Part 1, is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

2. Section 1.937 is amended by removing and reserving paragraph (b) and revising paragraphs (a) and (c) to read as follows:

**§ 1.937 Repetitious or conflicting applications.**

\* \* \* \* \*

(a) Where the Commission has, for any reason, dismissed with prejudice or denied any license application in the Wireless Radio Services, or revoked any such license, the Commission will not consider a like or new application involving service of the same kind to substantially the same area by substantially the same applicant, its successor or assignee, or on behalf of or for the benefit of the original parties in interest, until after the lapse of 12 months from the effective date of final Commission action.

(b) [Reserved.]

(c) If an appeal has been taken from the action of the Commission dismissing with prejudice or denying any application in the Wireless Radio Services, or if the application is subsequently designated for hearing, a like application for service of the same type to the same area, in whole or in part, filed by that applicant or by its successor or assignee, or on behalf of or for the benefit of the parties in interest to the original application, will not be considered until the final disposition of such appeal.

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